

REMARKS

Applicant has amended claims 1, 2 and 5. Applicant respectfully submits that the amendments to the claims are supported by the application as originally filed and do not contain any new matter. Accordingly, the Office Action will be discussed in terms of the claims as amended.

The Examiner has rejected claims 1, 2, 5, 7 and 9-11 under 35 USC 112, second paragraph, as being indefinite. In view of the amendments to the claims which are supported by the application as originally filed, Applicant respectfully submits that claims 1, 2, 5, 7 and 9-11 comply with the requirements of 35 USC 112, second paragraph.

Under the judicially created doctrine of obviousness-type double patenting, the Examiner has rejected claims 5, 7 and 11 as being unpatentable over claims 1-9 of U.S. Patent No. 6,517,831; rejected claims 1 and 9 as being unpatentable over claims 1-9 of U.S. patent No. 6,303,161; and rejected claims 2 and 9 as being unpatentable over claims 1-9 of U.S. Patent No. 6,303,161 in view of WO 96/08261.

In reply thereto, submitted herewith is a terminal disclaimer. Accordingly, Applicant respectfully requests that the Examiner withdraw the rejections under the judicially created doctrine of obviousness-type double patenting.

The Examiner has rejected claims 1, 5, 7, 9 and 11 under 35 USC 102 as being anticipated by USP 5,885,632, stating that the '632 teaches a process and material-obtained-by-the process wherein the process encompasses the steps of inoculating grains or crops such as soybeans with koji mold to create a koji preparation resultant, adding water to the resultant and removing phytic acid and although the '632 is silent with regard to the "substance that remains undigested ...", such a substance is inherent.

In reply thereto, Applicant has carefully reviewed the '632 and respectfully submits that while it may teach a process and material similar to that of Applicant's invention, it does not show, suggest or teach a "substance that remains undigested" and Applicant respectfully submits that such a substance is not inherent. Still further, Applicant respectfully submits that the Examiner has provided no evidence why such a substance would be inherent in the '632.

In view of the above, therefore, Applicant respectfully submits that claims 1, 5, 7, 9 and 11 are not anticipated by USP 5,885,632.

The Examiner has further rejected claims 1, 5 and 7 under 35 USC 102 as being anticipated by USP 4,308,284 in light of the evidence provided by the teachings of USP 5,885,632.

Firstly, Applicant respectfully submits that this rejection does not sound like one under 35 USC 102 and instead sounds like an obviousness rejection under 35 USC 103. Notwithstanding the above, it is still the Examiner's opinion that the '632 teaches a process and a product obtained by a process comprising the steps of cooking and cooling grains or soybeans, inoculating the grains with koji mold, adding aqueous suspension with two additional groups of beneficial microorganisms and lactic bacteria, fermenting and hydrolyzing the grains and it is the Examiner's opinion that the removing of the phytic acid is inherent as is the existence of the "substance that remains undigested".

In reply thereto, Applicant respectfully submits that there is no showing, suggestion or teaching in the '284 that the phytic acid would be removed or that the removal of phytic acid is inherent. Still further, Applicant respectfully submits that there is no suggestion, teaching or showing of the existence of the "substance that remains undigested" in the '284 or that it is inherent. Still further, Applicant respectfully submits that the Examiner has provided no evidence why the reduction of the phytic acid and the existence of the substance is inherent.

In view of the above, therefore, Applicant respectfully submits that claims 1, 5 and 7 are not anticipated by the '284.

The Examiner has also rejected claims 1, 5, 7, 9 and 11 under 35 USC 103 as being obvious over USP 5,885,632, USP 4,308,284 and USP 4,329,370.

In reply thereto, Applicant would like to incorporate by reference his comments above concerning Applicant's invention and the '632 and the '284. Still further, Applicant has carefully reviewed the '370 and respectfully submits that it too does not disclose the "substance".

In view of the above, therefore, Applicant respectfully submits that claims 1, 5, 7, 9 and 11 are not obvious over the '632, '284 and '370 patents.

The Examiner has further rejected claims 1, 2, 5, 7 and 9-11 under 35 USC 103 as being obvious over USP '632, '284, '370 and further in view of WO 96/083261, stating that WO '261 teaches that resistant starch is a suitable carrier for beneficial

microorganisms; and it would have been obvious to one of ordinary skill in the art to modify USP '632, '284 and '370 in view of the teachings of WO 96/083261.

In reply thereto, Applicant would like to incorporate by reference his comments above concerning Applicant's invention and USP '632, '284 and '370. Applicant has carefully reviewed WO '261 and respectfully submits that it does not disclose merely adding a resistant starch to the product, but instead discloses adding a probiotic microorganism mixed as a freeze dried suspension with resistant starch. In other words, Applicant respectfully submits that WO '261 teaches the addition of a resistant starch mixed with a probiotic microorganism and not merely the addition of a resistant starch.

In view of the above, therefore, Applicant respectfully submits that the combination suggested by the Examiner is not Applicant's invention and claims 1, 2, 5, 7 and 9-11 are not obvious over USP '632, '284 and '370 in view of WO '261.

Applicant further respectfully and retroactively requests a three-month extension of time to respond to the Office Action. Please charge Deposit Account No. 11-1445 in the amount of \$950.

In view of the above, therefore, it is respectfully requested that this Amendment be entered, favorably considered and the case passed to issue.

Please charge any additional costs incurred by or in order to implement this Amendment or required by any requests for extensions of time to KODA & ANDROLIA DEPOSIT ACCOUNT NO. 11-1445.

Respectfully submitted,

KODA & ANDROLIA

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